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E. ROBERT SEAVER, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 169

STEPHEN RADICH,

Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals
of the State of New York.

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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Statement of Interest of *Amicus Curiae*

The instant case involves the constitutionality of § 1425, subd. 16 of the New York Penal Law (now General Business Law § 136[d]), making the defiling and desecration of the American flag a misdemeanor. As the chief legal officer of the State (New York Executive Law § 63), the Attorney General is charged with the defense of State statutes (Executive Law § 71; New York Civil Practice Law and Rules § 1012[b]).

The statute at issue is compatible with the First Amendment guarantee of free speech, makes no invidious distinctions between forms of expression, and employs terminology which is sufficiently clear in describing the punishable conduct.

We agree with and endorse the position taken by the District Attorney of New York County with respect to his defense of the New York statute.

Questions Presented

1. Whether appellant's conviction for displaying sculpture which cast contempt upon the flag of the United States of America deprives him of his First Amendment right to freedom of speech.

2. Whether appellant's conviction for displaying sculpture which cast contempt upon the flag contravenes the Fourteenth Amendment's guarantee of equal protection of the laws.

3. Whether the statute fails to give adequate warning of the proscribed conduct or is overbroad in scope, and, therefore, violates the due process clause of the Fourteenth Amendment.

POINT I

Appellant's conviction for displaying sculpture which cast contempt upon the flag of the United States does not impinge upon the First Amendment right to freedom of speech.

Appellant argues that sculpture is the precise equivalent of speech and that because it seeks to express attitudes or ideas, it must be protected by the First Amendment. However, as this Court said in *United States* v. *O'Brien,* 391

U. S. 366, 376 (1967):

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

See in accord *Cox* v. *Louisiana*, 379 U. S. 536 (1965) and *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966).

Moreover, the facts of the instant case are an excellent illustration of the fallacies inherent in appellant's argument. The conduct in question* undoubtedly defiled the flag and at the same time completely failed to convey any idea other than this defiling. Counsel suggested at trial (Record on Appeal, p. 91a) that it signified "organized religion . . . supporting . . . aggressive acts." Hilton Kramer, the art news editor of the New York Times, who had reviewed the sculpture, testified that:

> "I felt it was the artist's intention to communicate something, but I personally did not feel politically stimulated by it." (Record, p. 109a)

Even in the context of the anti-war songs being played in the background, the "construction" merely dramatized the sculptor's view rather than expressing it. Obviously, the flag was draped over a phallus for shock effect and precisely because the sensibilities of most viewers would be offended. Utilization of the numerous other avenues for expressing anti-war or anti-religious sentiments would have informed the public of the precise nature of the protest; however, the sculptor chose instead to obscure the

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* The sculptor's "construction" was described in the opinion of the trial court (Record on Appeal, p. 25a) as "in the form of a large cross with a bishop's mitre on the headpiece, the arms wrapped in ecclesiastical flags and an erect penis wrapped in an American flag protruding from the vertical standard."

message in order to perpetrate a more dramatic and offensive act.

In *Hoffman* v. *United States*, 256 A. 2d 567, 569 (1969), defendant was convicted of violating 18 U.S.C. § 700, a federal statute substantially parallel to New York's § 1425, subd. 16. He wore a shirt which resembled an American flag and which bore a button saying "Vote Pig Yippie in Sixty-Eight." The District of Columbia Court of Appeals in affirming the conviction commented:

> "[Appellant] argues that his conduct was 'symbolic speech' and that no distinction should be made between symbolic and non-symbolic communication of ideas. We disagree. The First Amendment protects freedom of speech and not freedom of conduct."

Similarly, in *Cowgill* v. *California*, —— U. S. ——, 38 USLW 3262 [January 19, 1970], the defendant had cut up an American flag and fashioned it into a vest which was worn on a public street. In concurring in the vote to dismiss Cowgill's appeal from his conviction for flag mutilation, Mr. Justice Harlan (Mr. Justice Brennan concurring) noted that there was no attempt at dissemination of ideas apparent in his conduct from the record on appeal. While appellant in the instant case was found guilty of casting contempt on the flag rather than of mutilation, both involved the transformation of an actual American flag into a different object, for the apparent purpose of demonstrating an attitude rather than conveying a particular meaning. The exact nature of such a protest would have to be explained in words, and once this was done, the transformation of the flag would be merely incidental to the thought conveyed by the words.

Indeed, the picketing and draft card burning reviewed by this Court in *United States* v. *O'Brien, supra; Adderley* v. *Florida, supra;* and *Cox* v. *Louisiana, supra,* could be more

readily characterized as speech than the "construction" displayed by appellant, since they are specifically directed at the object of protest while the sculpture in itself was not. Thus, appellant Radich's difficulties in transforming the conduct at issue into speech are understandable. The flag of the United States is "symbolic of the existence and sovereignty of the Nation." *Halter* v. *Nebraska,* 205 U. S. 34, 41 (1906). However, it is not tied to any particular national policies or national leaders. Thus, statutes seeking to prevent acts which degrade the flag do not promote or demand orthodoxy of thought.

Appellant unsuccessfully attempts to equate this case with *Schacht* v. *United States,* 398 U. S. 58 (1970). In *Schacht,* the federal statute in question made it a crime for any person "without authority" to wear a uniform of the United States Armed Forces, except for an actor in a theatrical production "if the portrayal does not tend to discredit [the] Armed Forces" (10 U.S.C. § 772[f]). It is clear that while the Army is necessarily identified with military efforts, the flag is merely the emblem of our unity as a country. The provision at issue does not mandate or even encourage any particular attitude toward war or peace. It would prohibit sculpture casting contempt upon the flag regardless of whether the contempt was related to an anti-war demonstration or to a protest against governmental refusal to use the atom bomb in Vietnam.

A close analogy may be found in provisions requiring minimal affirmation of support for the United States and New York Constitutions. In *Bond* v. *Floyd,* 385 U. S. 116, 135 (1968), the United States Supreme Court in explicit terms differentiated support for the Constitution from agreement with particular aspects of national policy:

> ". . . [W]hile the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no

interest in limiting its legislators' capacity to discuss their views of local or national policy."

See in accord *Knight* v. *Board of Regents of the University of the State of New York,* 269 F. Supp. 339 (S.D.N.Y. 1967), aff'd 390 U. S. 36 (1968). The constitutional oath of office does not suppress the right of legislators to express political views or to inquire into and criticize State or national policy.

Appellant herein contends that the statute at bar compels respect for the flag. However, unlike *West Virginia State Board of Education* v. *Barnett,* 319 U. S. 624 (1943), New York's provision does not demand any expression of respect, nor even the minimal affirmation approved in such cases as *Bond* and *Knight.* It merely requires refraining from an *act* of desecration or contempt. See *People* v. *Burton,* 27 N. Y. 2d 198 (1970).

Nor is the case of *Tinker* v. *Des Moines Independent Community School District,* 393 U. S. 503 (1969), in any way analogous. There, school authorities attempted to prevent students from wearing black armbands. The concept of casting contempt was not involved and no governmental interest in preventing the wearing of the armband was demonstrated.

The decision below, relying upon this Court's rationale in *Halter* v. *Nebraska, supra,* cited the statutory purpose of preventing a breach of the peace* and pointed out:

"Whether defendant thinks so or not, a reasonable man would consider the wrapping of a phallic symbol with the flag an act of dishonor . . ."

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* The recent decision in *Long Island Vietnam Moratorium Committee* v. *Cahn,* —— F. 2d —— (2nd Cir. 1970) (appeal to be filed), which held invalid the statutory section prohibiting the placing of a mark on the flag, specifically distinguished the case at bar because of the difference in legislative intent underlying the two provisions.

Another lesson can be learned from *Halter* as well. If a state may legitimately prevent the national symbol from being used for commercial profit by purveyors of beer, it is clear that there is a special public interest in the flag. Statutes prescribe how the flag may be displayed, how it may be lawfully disposed of and for what purposes it may be used. See 4 U.S.C. § 3; 36 U.S.C. §§ 172 through 177. Cf. *Hodsdon* v. *Buckson*, 310 F. Supp. 528, 534 (D. Del. 1970).

This Court's decision in *Street* v. *People of New York*, 394 U. S. 576 (1969), demonstrates that acts involving the flag cannot be equivalent to words spoken about the flag. This distinction is clear from the fact that this Court remanded in *Street* so that the interlacing elements could be separated by the State courts. As to appellant herein, the conviction rests solely upon the fact that an American flag was fashioned into a construction which degraded it.

POINT II

The terms employed in the statute give adequate warning as to the conduct which is proscribed and are not unconstitutionally vague or overbroad.

In attempting to show that § 1425, subd. 16 of the New York Penal Law is unconstitutionally vague and therefore void, appellant quotes general language from cases which hold that a criminal statute must be sufficiently explicit to inform those who are subject to it of the nature of the conduct prohibited. However the language of New York's provision has the requisite clarity and specificity. Indeed, appellant was unable to find any decision which struck down the words "cast contempt upon" as being overly vague, either in the context of desecration of the flag or in any other context.

A case in point is *Hoffman* v. *United States, supra,* which sustained the constitutionality of 18 U.S.C. § 700.*

The Court held (256 A. 2d at 569-570):

> "A statute violates due process of law if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits; but a statute is not required to be drawn with the precision of a chemical formula or a mathematical equation. Only a reasonable degree of certainty is required in order that fair notice is given to those of ordinary intelligence. We hold that the Statute meets this test and we reject the claim that the Statute is unconstitutionally vague."
>
> * * *
>
> "The flag desecration Statute enumerates several forms of mistreating or abusing the flag which, by the very nature of the conduct, the offender is presumed to have intended to cast contempt upon the flag. The terms used in the Statute to describe the proscribed conduct; i.e. mutilating, defacing, defiling, burning or trampling, have clearly defined meanings in their ordinary usage, and each word connotes an objective act of desecration of the flag. In the present case the information charges appellant with mutilating, defacing and defiling the flag. The term 'defile' encompasses conduct which dishonors the flag as well as the generally more accepted use of making something filthy or dirty."

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* "(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year or both."

* * *

"[Flag of the United States includes any representation of the flag] by which the average person seeing the same without deliberation may believe the same to represent the flag."

The sculpture exhibited by appellant herein can be aptly described as defiling the flag under the criteria of the Court of Appeals quoted above.

Appellant states without elaboration that the use of the word "contempt" in the flag statute "involves an entirely different concept" from that of contempt of court (Br., p. 8). It is true that the underlying governmental interests are somewhat different in the two situations. However, in both, a course of conduct which is defined as contumacious is subject to penal sanction. In both, the definition of the word "contempt" is crucial to a finding that the offense has been committed. This refutes appellant's argument (p. 8) that the mere fact that he may be communicating an attitude is sufficient to insulate him from the statute's reach, and to render the statute constitutionally infirm. Terminology such as "casts contempt upon" has also been utilized and understood in numerous jurisdictions in the context of civil and criminal libel laws. Cf. *Beauharnais* v. *Illinois*, 343 U. S. 250 (1951); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 263, 269 (1963).

The fact that this terminology has sufficient specificity also answers appellant's claims of overbreadth. The statute includes in its ambit solely conduct which defiles the flag; in view of the valid state interest in preventing such conduct, and the other avenues of expression for political attitudes, there is no resulting incursion on First Amendment rights.

POINT III

The distinction between sculpture which casts contempt on the flag and news reporting on such sculpture, does not contravene the equal protection clause of the Fourteenth Amendment.

Appellant informs us (p. 27) that the equal protection clause of the Fourteenth Amendment forbids a state from

arbitrarily discriminating between different classes of persons, citing *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663 (1966). Building on this generality, appellant asserts that since the sculpture at issue was depicted in a news story in Life Magazine without any resulting prosecution, his conviction for displaying the sculpture results in a denial of equal protection.

However, appellant appears to have forgotten that the crux of the misdemeanor punishable by the New York statute is that of casting contempt upon the flag. While the exhibition offers the sculpture to the public on the ground that it has some inherent value or merit, a news report or photograph of the sculpture makes no such representation. News coverage, in the absence of editorial comment, merely informs the public that the exhibition has taken place.

It should also be noted that an onlooker might well be incited or provoked towards unlawful acts by seeing the actual flag defiled in a public place; however newspaper or magazine reference to such defilement is one step removed from the original object and would be unlikely to have such an effect.

Thus, the distinction is a rational one, in harmony with the standards created by this Court. *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970); *Walters* v. *City of St. Louis*, 347 U. S. 231, 237 (1954); *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961); *Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61 (1911).

CONCLUSION

The judgment below should be affirmed.

Dated: New York, January 4, 1971.

Respectfully submitted,

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